

REMARKS

Claims 1-9 were pending. By virtue of this response, claims 1 and 2 are amended, and claim 10 is added. Therefore, claims 1-10 are presently pending. Amendment of certain claims is not to be construed as a dedication to the public of any of the subject matter of the claims as previously presented. No new matter is added.

Claim 1 has been amended to recite that a unit can be moved towards a “goal area of the first player.” Support for this amendment can be found in Figure 1 and in the specification as filed on page 2 at lines 26-29.

Claim 1 has been further amended to recite that the brain wave frequency of the first player is below the brain wave frequency of the second player “thereby indicating the mental state of the first player is more relaxed as compared to the mental state of the second player.” Support for this amendment can be found throughout the specification, particularly at page 3 lines 30-31, page 4 lines 5-7, and page 6 lines 6-8.

Claim 2 has been amended to strike out the term “constant” when referring to the distance a floating unit may be over the playing area.

Claim 10 has been newly added. Claim 10 depends from claim 2 and recites the further limitation that the distance a floating unit is over a playing area is constant. Support for this claim can be found in the specification as filed on page 3, at lines 12-15.

Statement of Substance of Interview

Applicant thanks the Examiner for the courtesy of the telephone interview conducted on April 14, 2009. Present on the call were Examiners Dimitry Suhol and Seng Lim, Staffan Söderlund, the inventor, Michael Byström of Albihs AB, and Brian Ho and Megan Clarey of Morrison & Foerster. During the interview, claim 1 was discussed particularly with respect to Brotz (US Patent Number 5,213,338). Applicant proposed amendments to claim 1 consistent with those

presented herein. Applicant also presented arguments, with respect to patentability of the pending claims, consistent with the remarks presented herein. No agreement with respect to patentability was reached.

Claim Rejections Under 35 USC §103

Claims 1-3, 5-6, and 8

Claims 1-3, 5-6, and 8 were rejected under 35 U.S.C. 103(a) as being unpatentable over Brotz (U.S. Patent No.: 5,213,338) in view of Ohlschlager (U.S. Patent No.: 3,712,617).

The Examiner stated that Brotz discloses a game wherein the measured difference between two player's brainwave intensities or frequencies is compared to move a rotate a game unit "in the direction of the player producing the more intense brainwaves (claim 6)." Office Action at page 3, lines 8-11. The Examiner also stated that Ohlschlager discloses moving a ball through a maze. While recognizing that neither reference discloses the claimed frequency ranges for moving the game unit, the Examiner states that it would have been an obvious matter of design choice to designate which range of frequency moves the ball towards a designated direction. Office Action at page 3 to page 4, bridging sentence.

Applicant respectfully disagrees that the methods of the rejected claims are unpatentable over Brotz in view of Ohlschlager. It would not have been obvious to modify the method of Brotz, which moves an object in a player's direction when the player's brain waves are more intense, to operate on exactly the opposite principle. Applicant respectfully assert that MPEP 2143.01(VI) entitled, "The Proposed Modification Cannot Change the Principle of Operation of a Reference," and MPEP 2143.01(V) entitled, "The Proposed Modification Cannot Render the Prior Art Unsatisfactory for its Intended Purpose," are directly applicable to any proposed modification of Brotz to employ a method that moves an object in a player's direction when their brain waves are within the claimed range and lower than the other player's brainwave frequencies.

As stated clearly in Brotz, the game object moves in the direction of the player who produces the most brain waves (*i.e.*, highest frequency), ultimately determining the winner of the game. *See* Brotz at col. 2, lines 52-56; col. 5, lines 9-11; claim 6. Brain wave frequency is not arbitrary. Rather, one of skill recognizes that lower frequencies are generally associated with lower stress and calmness. *Cf.* Specification of the present application at page 3, lines 30-31 (“In general, the lower the frequencies the calmer the player is.”). Brotz, too, recognizes the relationship between frequency and known brain wave forms. *See* Brotz at col. 4, lines 13-14 (“Alpha, beta, delta and/or theta wave monitors...”). Based on the significance of brain wave frequency, one of skill would recognize that principle of operation of the game in Brotz is based on assigning the player with the higher brain wave frequencies (*i.e.*, the more “intense” player) as the winner. Modifying Brotz’s principle to the exact opposite criteria would not be obvious. Doing so would be akin to modifying the rules of a foot race so that the slowest, rather than the fastest, runner would be determined as the winner. MPEP 2143.01(VI) makes clear that the principle of operation is not a design element that would be obvious to modify.

Similarly, one of skill in the art, having an understanding of the significance of brain wave frequencies, would clearly recognize that the intended purpose of Brotz is to reward the more intense (as measured by brain wave frequency) player. While it is not expressly stated, one of skill would recognize that Brotz intends to train players to increase their brain wave frequencies. Modifying Brotz to designate a winner based on lower brain wave frequencies would render it unsuitable for the purpose of rewarding the more intense player. One of skill would clearly recognize that the intended purpose of Brotz is not to determine a winner based on an indication that “the mental state of the first player is more relaxed as compared to the mental state of the second player.” Claim 1 of the present application, as amended.

With respect to relaxation in particular, the Examiner states that Brotz discloses using the device to promote relaxation. Office Action at page 5, 3rd paragraph. While Brotz discloses that the device described therein can be used for relaxation, it is clear from the passages in column 1 line 66 through column 2 line 3, and in column 2 lines 29-31, that the relaxing effects in Brotz are

achieved by viewing Moire patterns visible to both players. As a result, any relaxation effect of Brotz benefits both players and is not directly associated with winning or losing the game.

For the above reasons, one of skill in the art would not look to Brotz for a method of playing a game wherein the game is won by having a more relaxed mental state as measured by brain wave frequency. Rather, one of skill would recognize that Brotz takes a fundamentally different, and diametrically opposed, approach to the use of brain waves in a game.

For the reasons stated above, Applicant respectfully requests that the rejection of the claims 1-3, 5-6, and 8 under 35 U.S.C. 103(a) be withdrawn.

Claim 7

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Brotz (U.S. Patent No.: 5,213,338) in view of Ohlschlager (U.S. Patent No.: 3,712,617) as applied to claim 1 and further in view of McCaslin (U.S. Patent No.: 4,332,385).

Applicant respectfully disagrees and traverses the rejection and its supporting remarks. Claim 7 is not obvious over Brotz in view of Ohlschlager, further in view of McCaslin, for substantially the same reasons discussed above. McCaslin does not cure the defects of Brotz and Ohlschlager. Applicant respectfully requests that the rejection of the claim 7 under 35 U.S.C. 103(a) be withdrawn.

CONCLUSION

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue. If it is determined that a telephone conference would expedite the prosecution of this application, the Examiner is invited to telephone the undersigned at the number given below.

In the event the U.S. Patent and Trademark Office determines that an extension and/or other relief is required, Applicant petitions for any required relief including extensions of time and authorizes the Commissioner to charge the cost of such petitions and/or other fees due in connection with the filing of this document to **Deposit Account No.: 03-1952** referencing **Docket No.: 616562000800**. However, the Commissioner is not authorized to charge the cost of the issue fee to the Deposit Account.

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